Supreme Court, U.S.
F I L E D
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No. 85-219

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

F. I. CORPORATION, dba
FLUIDYNE INSTRUMENTATION,
Petitioner,

VS.

BANK OF AMERICA, N.T. & S.A.
a National Banking Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Properly framed, the question presented is whether the evidence adduced by petitioner in the district court was sufficient to raise a legitimate and rational inference of a conspiracy between respondent and its commercial banking customer, Max Machinery, Inc., in violation of the Sherman Act, 15 U.S.C. § 1 and California common law.

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PRELIMINARY STATEMENT

The Petition provides no basis for review by this Court. Petitioner does not suggest that there is a conflict among the Courts of Appeals concerning the issues resolved by the Courts below. Nor does this case present any important or novel issues for resolution by this Court. Rather, petitioner is simply urging still another court to review the evidentiary record and conclude that a genuine factual dispute exists on the issue of conspiracy. Accordingly, the Petition is frivolous and should be denied.

CITATIONS TO OPINIONS BELOW

Respondent[1] is satisfied with the Citations to Opinions Below at page 1 of Petitioner's Brief with two exceptions. First, the transcript of proceedings in the District Court attached as Appendix F at pages A-12 and A-13 of Petitioner's Brief is irrelevant to the matter before this Court, as those proceedings occurred after respondent had been dismissed from the case. Second, on June 20, 1985, the Court of Appeals denied petitioner's motion for stay of mandate on the grounds that a petition for writ of certiorari would be frivolous. A copy of this Order is attached hereto as Appendix K.

COUNTER-STATEMENT OF THE CASE[2]

Beginning in 1968, a business relationship developed between petitioner FI and Max Machinery, Inc. ("MMI") whereby MMI manufactured certain products used in the processing of polyurethane, while FI designed and marketed them. FI originally invoiced the ultimate purchasers of products manufactured by MMI and managed the billing and collecting of accounts receivable.

Between 1978 and 1980, the business relationship between FI and MMI began to deteriorate until, in June 1980, FI commenced suit against MMI in state court. In that suit, FI charged MMI with various acts of unfair competition, including trademark infringement and interference with sales representative

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[1] Attached as Appendix L is a listing of information concerning respondent provided pursuant to Rule 28 of the Rules of this Court.

[2] In its brief, petitioner has restated its lengthy, but utterly conjectural, catalogue of "facts" with which both the District Court and Court of Appeals were confronted. Respondent will not reargue the facts here. Suffice it to say that many of the "facts" cited in petitioner's Brief are actually speculative and argumentative conclusions, personal opinion and belief and mischaracterization of record evidence. If, however, this Court believes that a detailed discussion of the facts would be helpful, respondent will be happy to provide the Court with a copy of its brief filed in the Court of Appeals.

contracts. After unsuccessfully seeking a preliminary injunction against MMI, FI dismissed its state court suit and filed a new action in federal court. There, in addition to again charging MMI with a wide range of allegedly unfair business practices stemming from the breakdown of the FI-MMI business relationship, FI for the first time alleged that respondent had conspired with MMI to drive FI out of business in violation of Section 1 of the Sherman Act and California common law.

FI sought to draw respondent into the FI-MMI conflict solely by virtue of respondent's commercial lending relationship with MMI, focusing primarily on events occurring in 1978 and 1980. First, in 1978, MMI requested additional financing from respondent, including accounts receivable financing, to meet working capital needs. At that time, FI was invoicing customers directly, and virtually all of MMI's accounts receivable were from FI itself, which had been experiencing cash flow problems. Respondent informed MMI that, under these circumstances, MMI did not qualify for accounts receivable financing and that, in order to qualify, MMI would have to invoice customers directly. MMI thereafter altered its relationship with FI so that, henceforth, MMI rather than FI would invoice customers. MMI then qualified for and received accounts receivable financing from respondent. While respondent was aware that MMI had altered its business relationship with FI, it did not believe that MMI was precluded, by contract or otherwise, from doing so. FI contended that the 1978 change in the invoicing of customers was part of a scheme devised by respondent and MMI to take over FI's property and drive it out of business.

Second, in 1980, when MMI began experiencing cash flow problems, respondent extended to MMI a series of working capital loans to provide its customer with the funds necessary to its recovery and financial stability. These loans consisted of two accounts receivable loans and loans against an inventory line of credit. FI contended that these loans were extended by respondent for the express purpose of financing the successful completion of its scheme to drive FI out of business.

After a year and a half of extensive discovery, respondent moved for summary judgment on the ground that FI had failed to

adduce any evidence from which a jury could rationally infer that respondent and MMI had entered into a conspiracy to drive FI out of business. In addition to other record evidence, respondent introduced the declarations of bank personnel which established that respondent had acted in furtherance of its own legitimate business interests and as a result of its independent business judgment. Respondent did not dispute that the evidence disclosed a course of dealing and a close relationship between itself and MMI, as well as agreements concerning financing and extension of credit. It argued, however, that such dealings are inherent in and natural to the normal commercial lender-borrower relationship, and do not reasonably tend to prove a conscious commitment by respondent to a common scheme designed by it and MMI to drive FI out of business.

On February 4, 1983, the District Court granted respondent's motion, agreeing that FI had failed to adduce any evidence of conspiracy sufficient to go to the jury. The Court stated:

> I've read what you have submitted, the extensive discovery, the voluminous pleadings, I've reviewed your memorandum, I've listened to your arguments, I simply can't see that you've indicated in any fashion any impropriety in the Bank's conduct here. Summary judgment would be appropriate here if the defendant does rebut your suspicions and your allegations with some probative evidence showing legitimate business reasons and legitimate alternative rationale for the conduct that you point up, and they've done that, *and the plaintiff simply hasn't come forth with anything specific to suggest that there is any rational view of this evidence that would support these suspicions that are translated into allegations of conspiracy between the Bank and Max.*
>
> * * * * *
>
> *Plaintiff has simply failed to demonstrate any evidence of any motive or intent to conspire sufficient to put to the jury any rational basis for their making such a finding,* and it would be outrageous to permit mere suspicion to justify bringing in everybody that supplied money, services, goods or anything else to an opponent in a lawsuit simply on the basis of the kind of suspicion and speculation that's involved here,

and the motion of the Bank for summary judgment will be granted.

A-9 and A-10. (Emphasis added).

The Court of Appeals unanimously affirmed, stating:

> In this case the Bank has presented evidence that its actions were based on its business judgment in advising Max Machinery on how to avoid cash flow problems through accounts receivable financing. We agree with the district court that F.I. has not responded to the Bank's evidence of business judgment with any specific factual allegations from which a jury could find the existence of a conspiracy between the Bank and Max Machinery.

A-3 (footnote omitted).

ARGUMENT

The Petition presents no novel or unresolved issues of law. See Rule 17 of the Rules of this Court. The decisions of both Courts below are based on the well-established principle that

> "Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper."

ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52, 55 (9th Cir. 1975); *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985); *Zoslow v. MCA Distributing Corp.*, 693 F.2d 870, 884-85 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983). This principle derives from this Court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90 (1968), and has been uniformly followed by the courts of appeals. *See, e.g., ALW, Inc. v. United Airlines, Inc.; Amay, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985); *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 948 (6th Cir. 1983); *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1027 (5th Cir. 1983); *White v. Hearst Corp.*, 669 F.2d 14,

17 (1st Cir. 1982); *Baum v. Gillman*, 648 F.2d 1292, 1295-97 (10th Cir. 1981); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981), *cert. den.*, 455 U.S. 988 (1982); *Lamb's Patio Theatre v. Universal Film Exchange*, 582 F.2d 1068, 1070 (7th Cir. 1987); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1080 (3rd Cir. 1978); *Modern Home Institute, Inc. v. Hartford Accident And Indemnity Co.*, 513 F.2d 102, 109 (2d Cir. 1975). Moreover, this principle simply reflects the application of Rule 56(e) of the Federal Rules of Civil Procedure in the context of antitrust conspiracy claims, and does not, as petitioner argues, deny a plaintiff the right to a jury trial, any more than Rule 56 itself does. To the extent petitioner is suggesting that summary judgment is inappropriate in antitrust cases, such an argument has long been rejected. *See, e.g., First National Bank v. Cities Service Co.*; *White v. Hearst Corp.*, 669 F.2d at 17; *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977).

Petitioner appears to argue that this Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), has somehow changed this long-standing approach to summary judgment in antitrust cases, and that the Court of Appeals erred in refusing to follow *Monsanto's* new approach. This argument is meritless. *Monsanto* did not deal with, let alone alter the rule requiring plaintiff to come forward with specific factual support for its claims once defendant has presented sufficient evidence of independent conduct to rebut plaintiff's allegations. Rather, *Monsanto* simply delineated the type and quantum of specific probative evidence a plaintiff must present in such situations to avoid summary judgment on the issue of conspiracy. *See Barnes v. Arden Mayfair, Inc.*, 759 F.2d at 680; *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369, 371-72 (9th Cir. 1985). Thus, after a defendant has offered evidence supporting an alternative and legitimate interpretation of its conduct, *Monsanto* requires plaintiff to present significant probative evidence that reasonably tends to prove that the defendant and others had a conscious commitment to a common unlawful scheme.

Moreover, the Court of Appeals' decision here is fully consistent with the standard set forth in *Monsanto*. In *Monsanto*, this Court held that, in dealer termination cases, evidence that a manufacturer had terminated a distributor in response to complaints from other distributors was insufficient to raise an inference of conspiracy. The Court reasoned that such evidence could as plausibly be explained as legitimate and independent business conduct, and that, to raise a legitimate inference of conspiracy, plaintiff must additionally present "evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." 104 S.Ct. at 1471. By so doing, the Court merely reaffirmed the traditional standard for proving conspiracies under the antitrust laws. It certainly did not lessen plaintiff's evidentiary burden in proving conspiracy cases in general.

In this case, both the District Court and Court of Appeals held that petitioner had failed to come forward with *any* specific factual evidence from which a jury could *rationally* infer a conspiracy between respondent and MMI. Such a ruling is fully consistent with *Monsanto* and with the settled principle that a party opposing summary judgment is entitled to the benefit of only reasonable inferences, and may not go to the jury on the basis of speculation and conjecture. *See, e.g., Barnes v. Arden Mayfair, Inc.*, 759 F.2d at 680. Petitioner's true complaint, then, is not that *Monsanto* was ignored,[3] but that both the District

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[3] Seizing upon a footnote in the memorandum decision below, petitioner contends that the Court of Appeals held that *Monsanto* has no application outside of dealer termination cases. Petitioner argues that this holding is not only incorrect, but is also in conflict with the ruling of another panel of the Ninth Circuit in *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676 (9th Cir. 1985). As explained above, however, whether or not the Court of Appeals expressly acknowledged the application of *Monsanto* to this case, its ruling, as well as the ruling of the District Court, was fully consistent with the standard set out in *Monsanto*. Moreover, petitioner's concern over the possible existence of an intracircuit conflict is misplaced. *Arden* is a published opinion, while the Court of Appeals' decision in this case was an unpublished memorandum without precedential effect. Moreover, intracircuit conflicts are more properly ad-

Court and the Court of Appeals concluded, after review of the particular facts of this case, that petitioner's evidence raised only speculative, as opposed to reasonable inferences of conspiracy.

Finally, petitioner argues that the standard enunciated in *Monsanto* places a greater burden on plaintiff than does California law, and that the Court of Appeals therefore erred in affirming the grant of summary judgment on petitioner's state law conspiracy claim. However, the granting of summary judgment after respondent has come forward with probative evidence of independent conduct and petitioner has failed to support its claim with specific facts from which a rational, as opposed to spectulative, inference of conspiracy can be drawn, is fully consistent with California law. *See Chern v. Bank of America,* 15 Cal.3d 866, 873, 127 Cal.Rptr. 110, 544 P.2d 1310 (1976) (a party opposing summary judgment which is supported by affidavits or declarations sufficient to sustain the motion, has the burden of showing that triable issues of fact exist); *Peterson v. Cruickshank,* 144 Cal. App. 2d 148, 164, 300 P.2d 915 (1956) (issues cannot go to jury on basis of speculation or conjecture). *See also Trans World Accounts, Inc. v. Associated Press,* 425 F.Supp. 814, 821 (N.D. Cal. 1977). Moreover, this is a purely parochial issue concerning the strictness with which a California state court, as opposed to a federal court, might review petitioner's evidence of conspiracy, and whether a state court might find reasonable what a federal court finds speculative. As such, it hardly rises to the level of an *Erie v. Tompkins* issue, and scarcely justifies intervention by this Court.

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dressed and cured by the circuits themselves on petitions for rehearing and suggestions for rehearing *en banc*. Petitioner did not raise this issue in its petition for rehearing, nor did it make a suggestion for rehearing *en banc*.

CONCLUSION

This is precisely the sort of case which this Court ought not to review—one which turns upon the application of a well settled and uniformly applied rule of law to unique facts which were thoroughly analyzed by the lower courts. The resolution of this case affects no one but the parties and its review by this Court can establish no guidance for any other litigants or courts. The Petition is an invitation to this Court to conduct a detailed and far reaching *de novo* review of the facts of this case. The invitation should be declined, and the petition for certiorari denied.

Dated: September 6, 1985

Respectfully submitted,

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APPENDIX K

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 84-2010

DC No. CV 81-3527-RHS

F. I. CORPORATION,
Plaintiff-Appellant

v.

BANK OF AMERICA, N.T. & S.A.,
a National Banking Corporation
Defendant-Appellee.

ORDER

Before: HALL, Circuit Judge.

Appellant's motion for stay of mandate is denied because a petition for writ of certiorari would be frivolous. *Cf.* 20 U.S.C.A. 9th Cir. R. 17.

APPENDIX L

The following information concerning respondent is provided pursuant to Rule 28 of the Rules of the Court. Respondent Bank of America is a wholly-owned subsidiary of BankAmerica Corporation, and is affiliated with the following companies:

BA Agency, Inc.
Ba Appraisals, Inc.
BA Cheque Corporation
BA Commercial Credit Corporation
BA Financial Services Corporation
BA Futures, Incorporated
BancAmerica Acceptance Corporation
BancAmerica Business Credit Corporation
BA Investment Management Corporation
BA Mortgage and International Realty Corporation
BancAmerica Commercial Corporation
BankAmerica Capital Corporation
BankAmerica Capital Investments, Inc.
BankAmerica Overseas Finance Corporation, N.V.
BankAmerica Realty Services, Inc.
BankAmerica Trust Company of New York
BankAmerica World Trade Corporation
The Charles Schwab Corporation
Decimus Corporation
Decimus Data Services Corporation
Decimus Data Services Corporation
FinanceAmerica Corporation
BA Insurance Company, Inc.
Charles Schwab & Co., Inc.
Decimus Computer Leasing Corporation
Overseas Asset Holdings, Inc.
Seafirst Corporation
Overseas Finance Limited (Cayman)
Overseas Lending Corporation
Western America Financial, Inc.
Seattle-First National Bank (Seafirst Bank)
Western National Bank
BA Facilities Leasing, Inc.
BA Finance (Japan) Ltd.
BA Leasing Corporation
BA Premises Corporation

BA Properties, Inc.
BA Properties III, Inc.
BameriLease Capital Corporation
BameriLease, Inc.
Banca d'America e d'Italia
BancAmerica Options, Inc.
Lease Holding IX., Inc. (and X)
Leasing Holding V. Inc. (thru VIII)
BAI Cartadi Credito
Lease Holding I, Inc. (thru IV)
Transit Holding, Inc.
BAI Leasing Sp.A.
Asset Holding Co., Inc.
BAI Luxembourg S.A.
BankAmerica International
BankAmerica International Financial Corporation
Bank America Nominees (Hong Kong) Ltd.
Bank America N. ninees Limited (London)
Bank America Nominees (Singapore) PTE Ltd.
BankAmerica Ventures, Inc.
Bankhaus Centrale Credit A.G.
Bank of America Canada
Bank of America International S.A.
Bank of America S.A.E.
Bank of America (France) S.A.
Bank of America International Limited
Bank of America (Jersey) Limited
Bank of America S.A. Costa Rica
Bank of America S.A.E.
Continental Auxiliary Company
Davenport Data Processors, Inc.
Managistics Incorporated
Merchants National Realty Corporation
NADRE I, Inc.
NADRE II, Inc.
BA Services, S.A.
BA Asia Limited
BA Australia Limited
BA Finance and Securities (Thailand) Limited
BA Finance (Guam) Inc.
BA Finance (Hong Kong) Ltd.
BA Finance (Switzerland) Ltd.

BA Australia Holding Proprietary, Ltd.
BA Australia Leasing Limited
BA (Australia) Hong Kong Limited
BA Investors Management Ltd.
Bamerical Investments (Australia) Limited
Bamerical Proprietary Ltd.
Bamerical Nominees (Australia) Proprietary Limited
BA Futures, Ltd.
BA Leasing (Singapore) PTE Ltd.
Bamerical Caribbean Finance Company, Inc.
BankAmerica Finance Ltd.
BankAmerica Holding Company, S.A.
Bamerical Mortgage & Finance Company, Inc.
Bank America Trust & Banking Corporation (Bahamas) Limited
BankAmerica Trust & Banking Corporation (Cayman) Limited
Bank America Trust & Banking Corporation (Gibraltar) Limited
BankAmerica Trust Company (Hong Kong) Ltd.
Danroy Ltd.
Trunoms, Ltd.
Wolnoms, Ltd.
BankAmerica Trust Company (Jersey) Limited
Bank of America Cameroon S.A.
BankAmerica Properties (Jersey) Limited
Bank of America S.A. Costa Rica
Bank of America S.A. (Argentina)
BankAmerica Insurance Services, Ltd.
BankAmerica Representacao e Servicos Limitada
Finamerica Paraguaya S.A.
Financiera Bamerical S.A.
First Panbalc, S.A.
Hedges, S.A.
Inversiones BankAmerica S.A.
Palissade, S.A.
Servicios Gerenciales para la Agricultura, S.A.
Sistemas Bamerical, S.A.
Servicios Gerenciales para la Agricultura, S.A.
Compania Agricola Industrial Tierra Linda S.A.